No. 10094.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TOM MASON, MARCO CVITANICH and MITCHELL CVITANICH, Owners of DIESEL SCREW "BLUE SKY," her tackle, apparel, engines, furniture, etc.,

Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

OPENING BRIEF FOR APPELLANTS TOM MASON, MARCO CVITANICH AND MITCHELL CVITANICH.

LASHER B. GALLAGHER,
1220 Rowan Building, Los Angeles,
Proctor for Appellants Tom Mason, Marco Cvitanich and Mitchell Cvitanich.

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Jurisdictional Statement.

This is an appeal in admiralty from a final decree entered by the United States District Court for the Southern District of California, Central Division, in an action for wages, arising out of an injury sustained by the libellant while he was on the Diesel Screw "Blue Sky," on the 22nd day of September, 1931, which said vessel was at that time moored to a dock in the port of Los Angeles, navigable waters of the United States.

The pleadings in the District Court were: A libel *in rem,* filed by libellant John Evanisevich [Ap. 3];*

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*References are to pages in printed Apostles.

claim of Tom Mason, Marco Cvitanich and Mitchell Cvitanich, as the owners of the vessel "Blue Sky" [Ap. 10]; and their answer to libel [Ap. 17].

The District Court, after trial before the court, ordered judgment in favor of libellant for a share of sardines taken by the vessel during the sardine season subsequent to the date of libellant's injury, said order being signed on March 29th, 1941, and filed March 31st, 1941 [Ap. 21]. Further evidenec was received and on October 8th, 1941, a second order for judgment in favor of libellant for a share of the sardines taken and maintenance was ordered [Ap. 22].

Findings of Fact and Conclusions of Law were filed on February 20th, 1942 [Ap. 24].

Final decree was entered on February 20th, 1942 [Ap. 28].

Appellants have appealed from the final decree pursuant to which it is ordered, adjudged and decreed that the libellant recover the sum of $1,130.78, as libellant's share of the sardines taken, with interest thereon from the 1st day of March, 1942, at 7 per cent per annum; and the further sum of $431.00 as maintenance, with interest thereon from the 12th day of July, 1942, at 7 per cent per annum; and costs of libellant taxed in the sum of $59.81.

The transcript of the apostles on appeal, certified by the clerk of said District Court, includes the following: petition for appeal [Ap. 31], order allowing appeal [Ap. 36], notice of appeal [Ap. 40], bond on appeal [Ap. 37] and citation on appeal [Ap. 1].

The jurisdiction of the District Court over actions, civil and maritime, involving claims for wages and maintenance arises from Article III, Sections 1 and 2 of the

United States Constitution, which provide that the judicial power of the United States shall be vested in the Supreme Court and in such inferior courts as Congress may establish, and that such power shall extend to all civil causes of admiralty and maritime jurisdiction.

Jurisdiction of civil causes of admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, c. 20, Secs. 9, 11; 1 Stat. L. 76, 78; 28 U. S. C. A. Sec. 371.

Appeals from final decrees in admiralty are authorized by Section 128a of the Judicial Code, as amended February 13th, 1925, effective May 13th, 1925 (43 Stat. L. 936, 28 U. S. C. A. Sec. 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review, by appeal, final decisions.

Statement of the Case.

On April 15th, 1939, the libellant was employed as a fisherman for the tuna season which was about to commence. Fishing for tuna occurred in Mexican waters. The libellant sustained his injury about a month subsequent to the end of the tuna season. Between the end of the tuna season and the time of the accident, the libellant was employed for the sardine season. Between the time the vessel arrived in the port of Los Angeles, subsequent to the tuna season, and September 22nd, 1939, the date upon which libellant sustained his injury, certain work had been done in and about the repair of a clutch connected with the Diesel engine; said clutch being removed from the vessel, sent to a machine shop on shore, then returned to the vessel and reinstalled therein. The libellant had assisted in taking the clutch out of the vessel. In addition to that work, the fishermen who were em-

ployed for the sardine season did certain work in and about preparing the sardine nets. On the morning of September 22nd, 1939, the libellant came aboard the vessel and although the master was not on board, the vessel was navigated within the harbor for the purpose of trying out the clutch. The libellant had nothing whatever to do in connection with this particular activity. Although the great preponderance of the evidence is that the libellant did absolutely nothing on board the vessel on September 22nd, 1939, he testified that sometime between 8 a. m. and approximately 10:30 a. m. he repaired a scoop net. A scoop net is a small net attached to a metal ring and the ring is attached to one end of a pole. The testimony most favorable to the libellant, with reference to whether he did any work of any kind on September 22nd, 1939, is that all work of every kind and character necessary in order to prepare the vessel and all appliances and equipment appurtenant thereto was completed at approximately 11 a. m. The libellant and the other fishermen then aboard the vessel had their lunch. Lunch was completed at approximately 12 o'clock noon on September 22nd, 1939. The libellant was injured close to 2 o'clock p. m. on said day.

There was a single mast on the vessel and there was some rope or cable rigging from the gunwale on each side of the mast, said rigging being connected to the mast at a point near the tip thereof and there were steps or rungs in said rigging. The vessel was moored portside to the dock and the libellant approached the gunwale at a point where the lower end of said rigging was attached to the gunwale or near the gunwale and stepped upon the gunwale with one foot, putting his other foot on the wharf. By reason of the action of the tide, the vessel was caused

to move sidewise from the edge of the wharf and the libellant's foot slipped. When he slipped he took hold of part of the rigging and as his body dropped he strained or sprained his shoulder and the muscles connected therewith.

The libellant had no duty of any kind or character aboard the vessel from the time he commenced to eat his lunch up to and including the time of the accident. Most of the fishermen had left the vessel for the purpose of going home, prior to the time the libellant attempted to leave. The reason the libellant remained on the vessel after finishing his lunch was that the weather was very hot and he stayed aboard drinking beer because it was so hot [Ap. 65, 68, 96, 97, 98, 99, 117, 118, 119, 120 and 121].

The other fishermen on board testified that Evanisevich had done no work of any kind on the vessel on September 22, 1939 [Ap. 127-130; 145, 147, 195, 197, 203, 210, 211, 212]. The master was not on board at all on September 22, 1939 [Ap. 221].

The District Court, on this evidence, found "that it is true that on the 22nd day of September, 1939, just before the ship started upon its fishing season for sardines, and while the libellant was engaged in the service of his said ship in that he was in the act of departing from said ship after performance of his duties as a member of said ship's crew and while he was subject to call of duty as a member of the crew of said ship which was then and there lying in the navigable waters of the Port of Los Angeles, slipped from a ladder and part of the equipment of said ship, and the adjoining wharf, severely injuring his left arm and shoulder." [Ap. 24, 25.]

Assignment of Errors.

The Assignment of Errors upon which appellants rely are set forth in the Appendix to this brief, and are summarized in the following statement of points involved in the appeal of said appellants.

1. This appeal in admiralty is a trial *de novo*.

2. The libellant was not in the service of the vessel at the time he sustained his injury.

3. The libellant unnecessarily and for his own pleasure and convenience loitered and entertained, amused and interested himself in matters and things entirely foreign to any service for the ship for an unreasonable length of time after all work which could possibly have been done in or about preparing the vessel for an intended fishing voyage had been completed.

4. Under the general maritime law is a seaman entitled to wages to the end of the contemplated term of an express or implied contract of employment which conceivably might continue for many months during which time many separate voyages would be completed, or does the right to wages expire at the end of each separate voyage in the event the seaman is injured while in the service of the vessel?

5. Is a fisherman, engaged in repairing or making a fishing net, engaged in maritime service merely because while doing so he is on a fishing boat moored to a wharf, or if injured under such circumstances is he subject to the provisions of the workmen's compensation law of the State of California within which such vessel was located at the time of the injury? [Assignment of Errors Nos. I, II, III, V, VI, VII, VIII, IX, XI, XII, XIII, XIV, XV and XVI; Ap. 32].

Outline of Argument.

I. This admiralty appeal is a trial *de novo*.

II. The testimony of the libellant conclusively establishes that the libellant was not injured while in the service of the ship.

III. A seaman injured while in the service of the ship is not entitled to wages beyond the end of the specific voyage before the commencement of which or during which the injury occurs.

IV. A fisherman engaged in repairing a fishing net is not engaged in maritime service or in the service of the ship merely because while doing so he is upon a vessel moored to a wharf and under such circumstances the workmen's compensation laws of the state where the accident occurs are applicable.

I.

This Admiralty Appeal Is a Trial de Novo.

It is unnecessary to cite any authority to establish the contention that an admiralty appeal is a trial *de novo*.

II.

The Testimony of the Libellant Conclusively Establishes That the Libellant Was Not Injured While in the Service of the Ship.

According to the testimony given by the libellant, he put in some time prior to 11 a. m. on September 22nd, 1939, repairing a scoop net and while repairing the scoop net the libellant was on board the vessel "Blue Sky." He and the other fishermen commenced eating their lunch at about 11 a. m. on said day and finished not later than 12 o'clock noon. From the time the libellant finished his lunch until he left the vessel which, according to his own testimony, was "around 1:30; close to 2 o'clock" [Ap. 120], he did absolutely nothing but loaf around on the vessel, occasionally having a can of beer, and the only reason he stayed on board was that the temperature was high.

For the law with reference to the right of a seaman to recover wages and maintenance, appellants refer to *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, where the Court says:

> "That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, *in the service of the ship*, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." (Emphasis added.)

The libellant was injured while on the ship and therefore the important question to be determined is whether he was injured in the service of the ship.

There is no branch of the law where the Courts have interpreted any basic rule more liberally in favor of employees than the various workmen's compensation statutes. The language "in the course of his employment" as used in such statutes is the equivalent of the language "in the service of the ship." Therefore, cases dealing with unncessary loitering upon the premises of an employer are strictly analogous to the question involved in this subdivision of appellants' brief.

In the case of *Makins v. Industrial Accident Commission*, 198 Cal. 698, the rule is clearly stated as follows:

> "The rule is well settled that an employee in going to work, comes under the protection of the Act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are not wholly under the employer's control and management (Starr Piano Co. v. I. A. C., 181 Cal. 453, 184 P. 860; Judson Mfg. Co. v. I. A. C., 181 Cal. 300, 184 P. 1); and the same rule applies when the employee is leaving such working premises provided he does not unnecessarily loiter thereon (Wabash R. Co. v. Industrial Commission, 294 Ill. 119, 128 N. E. 290; Lienau v. Northwestern Teleph. Exch. Co., 151 Minn. 258, 186 N. W. 945)."

Appellants desire to call particular attention to the last part of this language, to wit, "and the same rule applies when the employee is leaving such working premises *provided he does not unnecessarily loiter thereon.*"

To the same effect is the later case of *Jimeson v. Industrial Accident Commission,* 23 Cal. App. (2d) 634, 73 Pac. (2d) 1238. Cases from other jurisdictions to the same effect are the following:

C. A. Y. Construction Co. v. Smallwood, 104 Ind. A. 277, 10 N. E. (2d) 750;

Grady v. Nevins Church Press Co., 15 N. J. M. 190, 189 Atl. Rep. 668;

Schwartz v. State, 277 N. Y. 567, 13 N. E. (2d) 476. (Please see also: 251 App. Div. 634, 297 N. Y. S. 815.)

These cases, in general, recognize the following principles: The period of employment during which injury may occur and be compensable under compensation acts includes a *reasonable* time for ingress to and egress from place of work while on the employer's premises, and is not limited to the exact moment when the employee reaches the place where he begins his work or to exact moment when he ceases that work, but includes a *reasonable* amount of time and space before and after ceasing actual employment, having in mind all of the circumstances connected with the accident. An injury to an employee is compensable as arising out of employment where the employee is injured in an accident occurring on the premises of the employer, while the employee is entering or leaving the premises *within a reasonable time before or after actual working hours.* Generally, if an employee is injured on the premises of the employer, in going, with

reasonable dispatch and method, to or from actual performance of specific duties of the employment by a way provided by the employer or reasonably used by the employee, compensation must be awarded.

In the case of *Adams v. Uvalde Asphalt Paving Co.*, 200 N. Y. S. 886, the claimant was employed as a laborer at the plant of his employer. At 11:30 on the morning of his accident the claimant and about fifteen others were laid off because of some unforeseen event which made it unnecessary for the employer to make use of those men any longer on that day. Some of the other employees at the plant finished out a full day. The workmen were allowed to eat their lunch on the premises, and the plaintiff did eat his lunch, although the record does not disclose just when he did so. Notwithstanding the fact that he had been laid off at 11:30 a. m., it is agreed that at 1:50 p m. he was proceeding to wash up, preparatory to leaving for home, when he was injured. He was still upon the premises of his employer. He attempted to get his pail, which had fallen in a ditch, for the purpose of getting hot water for washing himself, when his foot slipped into a hole where there was hot water, and he received severe burns, causing the disability for which an award has been made. He was a colored man, and his work caused him to become covered with a white dust. It was the custom of the men to wash up before they left the plant, so that they would have a proper appearance on the train or cars upon which they traveled in going home.

The Court stated as follows:

> "No case has been cited to us where an award has been made to an employee who was injured after having loitered upon the premises after his employment has ceased, and we think that this claimant cannot be deemed to have been injured while going with reasonable dispatch from the premises of his employer after the completion of the duties of his employment, when he remained upon the premises for a period of two hours and twenty minutes after he was laid off, and without any justification therefor, other than the eating of his lunch. He was not in the course of his employment at the time of his injuries, and therefore the award cannot be sustained."

The libellant in the case at bar gives absolutely no legitimate excuse or reason for being on board the vessel at the time of the accident excepting his own desire to loiter there because of the heat. It is probably true that the libellant was engaged in personal conversations with one or two other men who remained on board and that during the afternoon there was considerable drinking of cool beer. Such conduct, however, does not, by any stretch of imagination, put the libellant "in the service of the ship."

III.

A Seaman Injured While in the Service of the Ship Is Not Entitled to Wages Beyond the End of the Specific Voyage Before the Commencement of Which or During Which the Injury Occurs.

Appellants will assume, without in the slightest degree conceding, that the libellant was a seaman and was injured while in the service of the vessel, for the purpose of presenting this question of law for the decision of the Court.

If a seaman has entered into a contract pursuant to which he is employed for a specific term which may include many separate voyages and is injured in the service of the ship during one of the specific voyages contemplated or between the termination of one specific voyage and the commencement of another, is such seaman entitled to recover the entire amount which he would have earned if he had remained in the service of the ship during the entire contemplated term, or is he entitled to recover the wages he would have earned during one of the specific voyages?

Let us assume that a ship-owner enters into a contract pursuant to which a seaman is employed as a deck-hand on a river boat which makes one trip per day between the port of San Francisco and the river port of Sacramento, California; that the term of employment is five years. Let us assume further that the sailing time of the vessel is 6 p. m. and that at five minutes to six he trips, falls and breaks his arm. It is necessary for the seaman to imme-

diately leave the vessel and obtain hospital care and attention. The seaman goes to the Marine Hospital at San Francisco and at the end of three weeks is released, fully cured. Is such seaman entitled to recover what he would have earned during that portion of the five-year period of employment which was unexpired at the time of the injury?

When the rule with reference to the right of a seaman to recover maintenance and cure, at least to the end of the voyage during which he was injured and to his wages to the end of the voyage, was first announced, there were no unions and there was no National Labor Relations Act. Originally each seaman would sign Shipping Articles which contemplated a complete voyage. Under the rules and conditions which now prevail few, if any, seamen are not members of a union of some kind. The unions make contracts with the ship-owners and pursuant to the terms of most of these contracts each member of the union is entitled to be employed indefinitely in the absence of intoxication or certain specified serious infractions of rules. In other words, the ship-owners do not any longer have the right to employ a seaman for a single voyage but must take him as a permanent employee.

The decision of the District Court in *Enochasson v. Freeport Sulphur Co.*, 7 Fed. (2d) 674, at 675, states:

> "Respondent contends that while, under The Osceola, 189 U. S. 175, 23 S. Ct. 483, 47 L. Ed. 760; The Bouker, 241 F. 831, 154 C. C. A. 533, and other cases preceding and following, as to libelant's maintenance and cure, the question of a particular voyage is not controlling, the determinative factor there is the passage of a reasonable length of time after the onset of the illness. It contends vigorously, however,

that the right to wages is limited to the termination of the voyage in the course of which the sickness occurred, which under the facts of this case it contends was April 15, the return of the vessel to Freeport. Libelant contends, on the other hand, that the 'voyage' referred to in The Osceola and other cases means, not a passage to a particular port and return, but the duration of the term of employment.

"I have examined all of the cases cited and available on the point, and find that the lack of certainty which exists in them springs out of the fact that the discussion of the point has always proceeded from an assumption of a rule, without a full statement of the principles upon which that rule is grounded. The Osceola merely states the rules applicable in different jurisdictions, without a discussion of the principles which make those rules sound, and, as is the case where there is only a 'bare bones' statement of a rule, the application of that rule continues to be involved in uncertainty. A slight reflection upon the principles which must be the basis of the rules will, I think, make it clear that the term 'voyage', as used in the authorities, has reference, not to a particular passage from port to port, but to the *whole term of the mariner's employment.*" (Emphasis added.)

The decision of the District Court in the case at bar is in accordance with the decision in the case just hereinabove referred to. Appellants contend that the rule announced in the *Enochasson* case is not equitable.

If a seaman is injured, while in the service of the vessel, as the sole proximate result of his own negligence he is nevertheless entitled, as a matter of right, to his wages to the end of the voyage and to maintenance and cure.

If he is injured while in the service of the vessel as a proximate result of the unseaworthiness of the vessel or of a failure to supply and keep in order the proper appliances appurtenant to the vessel, then he is entitled to compensatory damages in addition to his maintenance, cure and wages to the end of the voyage. If he is injured as a proximate result of the negligence of any of the officers of the vessel or of any fellow crew member he is entitled to maintenance, cure and wages to the end of the voyage and also to compensatory damages under the Jones Act. In an action for indemnity pursuant to the general maritime law or an action for damages under the Jones Act loss of earnings would be an element of damage.

If the rule stated in the *Enochasson* case is literally applied then it would be possible for a seaman to collect thousands of dollars without performing more than ten days of labor as follows: On June 1st, 1941, he enters into a contract for a term of five years. He is injured on the same day and must leave the service of the vessel in order to obtain treatment. Two days later he is cured and makes another contract with another ship-owner for a term of five years. On the same days he suffers the same kind of injury and is incapacitated for the same time. This could proceed *ad infinitum*. Every time the seaman is injured in the service of the vessel and his injury is such as to make it necessary for him to leave the vessel, he would be entitled to his wages for the whole term of his employment, if the rule followed by the learned District Judge is the true rule.

Appellants respectfully contend that when the reason for a rule ceases the rule itself ceases. Seamen are no longer the helpless or ignorant or improvident individuals they once were. As a matter of fact when, in ancient days, seamen were illiterate, the great proportion of land workers were likewise ignorant and illiterate. The public school system as prevalent throughout the United States has resulted in a general improvement in so far as the citizenry is concerned. In ancient times it was true that the seaman was subject to abuse and there were many cruel masters and mates. In those ancient times a seaman had no one to aid him. He could not refuse to obey an unreasonable order while on a vessel. Today the conditions are practically reversed.

The Supreme Court has decided that seamen are entitled to the protection of the National Labor Relations Act. *Vide: National Labor Relations Board v. Waterman S. S. Corp.,* 309 U. S. 206, 84 L. Ed. 704.

In the case at bar the evidence shows that subsequent to the time of the accident the vessel proceeded to San Francisco and proceeded to fish. The men were paid $344.12 each as their share of the profits of the fish caught during "the first dark." [Ap. 88, 89.] It is the contention of the appellants that the voyage, for the purpose of determining what, if any, wage was due the libellant was that period of time up to the first payment of profit to the fishermen and that the libellant was not entitled to a share of the profits for the entire sardine season.

IV.

A Fisherman Engaged in Repairing a Fishing Net Is Not Engaged in Maritime Service or in the Service of the Ship Merely Because While Doing So He Is Upon a Vessel Moored to a Wharf and Under Such Circumstances the Workmen's Compensation Laws of the State Where the Accident Occurs Are Applicable.

Appellants contend that the workmen's compensation laws of the State of California are applicable to the injuries sustained by the libellant if he was injured while in the service of the vessel for the reason that those laws may be invoked without in the slightest degree interfering with the harmony and uniformity of admiralty law.

In the case of *E. V. Parker v. Motor Boat Sales Inc.,* Advance Opinions, United States Supreme Court, Lawyer's Edition, Volume 86, 250 at 252, the Court says:

> "If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress *could* have established exclusive federal jurisdiction, is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. Employers' Liability Assur. Corp. v. Cook, *supra* (281 U. S. 237, 74 L. Ed. 825, 50 S. Ct. 308). Congress having expressly kept out of the area in which 'recovery . . . may . . . validly be provided by state law,' the argument may be made that Virginia would have been unhampered in providing for compensation here.
>
> "The decision of this Court in Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. Ed. 1086, 37 S. Ct. 524,

L. R. A. 1918C 451, Ann. Cas. 1917E 900, 14 N. C. C. A. 597, however, severs a link in this chain of reasoning. For, under the holding of that case, even in the absence of any congressional action, federal jurisdiction is exclusive and state action forbidden in an area which, although of shadowy limits, doubtless embraces the case before us. The basis of the decision, that Art. 3, Sec. 2, of the Constitution extending the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction' is tantamount to a command that no state may interfere with the harmony and uniformity of admiralty law, and that on the facts of that case recovery under a state statute would work such an interference, *was rejected by four dissenting members of the Court.* And when the doctrine of the Jensen case was reaffirmed in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 64 L. Ed. 834, 40 S. Ct. 438, 11 A. L. R. 1145, 20 N. C. C. A. 635, and Washington v. W. C. Dawson & Co., 264 U. S. 219, 68 L. Ed. 646, 44 S. Ct. 302, 24 N. C. C. A. 253, *sharp disagreement was again expressed in dissenting opinions.* We have *not* been called upon here, however, to *reconsider* the constitutional principles announced in those cases, and we are convinced that such a reconsideration is not necessary for disposition of the case before us.

"What we are called upon to decide is *not* of constitutional magnitude. For, regardless of whether or not the limitation on the power of states set out in the Jensen case is to be accepted, it is not doubted that Congress could constitutionally have provided for recovery under a *federal* statute in this kind of situation. The question is whether Congress has so provided in this statute. The proviso of Sec. 3(a), 33 U. S. C. A., Sec. 903(a), aside, there would be no

> difficulty whatever in concluding it has. For the Act expressly includes within its ambit accidents 'arising out of and in the course of employment' in the case of employees engaged 'in maritime employment, in whole or in part, upon the navigable waters of the United States,' and Armistead's death was the result of such an accident. While the proviso of Sec. 3(a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide." (Emphasis added.)

It will be seen from the foregoing that the United States Supreme Court will, whenever this question is again submitted to it, follow the dissenting opinions in the case of *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 61 L. Ed. 1086, 37 S. Ct. 524.

The reason the United States Supreme Court did not go into the question of jurisdiction in the *Parker* case is that "it is not doubted that Congress could constitutionally have provided for recovery under a *federal* statute in this kind of situation."

If there were no federal statute covering the situation involved in the *Parker* case there is little doubt about the fact that the Supreme Court would have held that the sole recourse of the dependents of Armistead was pursuant to the Workmen's Compensation Act of the State of Virginia.

In addition to the foregoing decision, appellants rely upon the following cases:

Surgeon v. Alaska Packers Ass'n, 26 Fed. Supp. 241;

Alaska Packers Ass'n v. Marshall, 95 Fed. (2d) 279;

Alaska Packers Ass'n v. Industrial Acc. Commission of the State of California, 276 U. S. 467, 72 L. Ed. 656, 48 S. Ct. 346.

Conclusion.

Appellants respectfully submit that the final decree of the District Court should be reversed and that this Honorable Court should make findings of fact and upon conclusions of law deduced therefrom, enter a final decree dismissing the libel.

Dated: Los Angeles, June 5th, 1942.

LASHER B. GALLAGHER,

Proctor for Appellants Tom Mason, Marco Cvitanich and Mitchell Cvitanich.

APPENDIX.

Assignment of Errors by Appellants Tom Mason, Marco Cvitanich and Mitchell Cvitanich.

I.

The District Court erred in finding that while the libellant was engaged in the service of his said ship he slipped from a ladder and part of the equipment of said ship and the adjoining wharf, severely injuring his left arm and shoulder.

II.

The District Court erred in finding that at the time of libellant's injury he was engaged in the service of his ship.

III.

The District Court erred in finding that the libellant was injured while he was subject to any call of duty as a member of the crew of the "Blue Sky."

IV.

The District Court erred in failing to make any finding whatever with reference to the issue that the libellant was injured while doing his duty and obeying the commands of the master of the vessel.

V.

The District Court erred in not finding in accordance with the uncontradicted evidence that the libellant was not in the service of the ship at the time of his injury.

VI.

The District Court erred in not finding in accordance with the uncontradicted evidence that the libellant, on the day of the accident, had completed any and all possible

service to the ship at a time not later than 12 o'clock noon and that for the sole and exclusive pleasure of the libellant he unncessarily loitered and remained on the vessel until sometime between 1:30 p. m. and 2 p. m. of said day.

VII.

The District Court erred in finding that the libellant was entitled to a 1/17th lay or share of fish caught and sold during the Sardine season subsequent to September 22nd, 1939.

VIII.

The District Court erred in finding that the libellant is entitled to demand and have the ship pay his expenses incurred in and about his support from September 22nd, 1939, to July 12th, 1940.

IX.

The District Court erred in finding that the libellant was entitled to any maintenance whatever for any time whatever.

X.

The District Court erred in finding that there is due the libellant for maintenance, the sum of $431.00 with interest at the rate of 7% per annum from July 12th, 1940, or for any sum whatever either with or without interest.

XI.

The District Court erred in finding that all and singular or all or singular the premises are true.

XII.

The District Court erred in finding that the premises are within the Admiralty jurisdiction of said court.

XIII.

The District Court erred in finding that the libellant was entitled to a 1/17 lay or share of the entire proceeds

of the Sardine season subsequent to September 22nd, 1939, for the reason that the Sardine season included many voyages and if a seaman is injured while in the service of a vessel he is entitled at most to wages only to the end of a particular voyage and is not entitled to wages to the end of the period of employment which may have been agreed upon and which may include many voyages.

XIV.

The District Court erred in finding that the subject of the action was within the Admiralty jurisdiction for the reason that the exclusive remedy of the libellant was within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission.

XV.

The District Court erred in concluding that libellant is entitled to a judgment against respondent in the sum of $1130.78 as wages for the Sardine season ending on or about the 1st day of March, 1940, with interest thereon from said March 1st, 1940, at the rate of 7% per annum and for the additional sum of $431.00 as maintenance from September 22nd, 1939, to July 12th, 1940, with interest thereon from July 12th, 1940, at the rate of 7% per annum.

XVI.

The District Court erred in not concluding that the libellant is not entitled to recover any sum whatsoever from the respondent "Blue Sky" or from the claimants, or any of them, and in not concluding that the libel should be dismissed with costs to the respondent and claimants. [Ap. 32-35.]